



**HB 5267 – Presumption of Joint Custody
Presented by the Michigan Advocacy Project
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House Families and Children Services**

A presumption of joint custody does not serve the best interests of children

While joint custody may be appropriate where parents voluntarily and wholeheartedly commit to such an arrangement, a presumption of joint custody is inconsistent with the conflict and minimal communication that is characteristic of many parents who seek a judicial determination of custody.

Joint custody requires an enormous amount of effort and determination and the part of parents. Parents must create two homes fully equipped for themselves and their children, coordinate schedules and communicate with each other regarding short and long term decisions about the children. Despite extensive research, there is no conclusive evidence that a presumption of joint custody is in the best interests of children. Rather, studies are now recommending that states not mandate a presumption of joint custody but continue a case-by-case determination of the best outcome for a child focused on the particular needs of each family.

In 1979, California adopted a joint custody presumption, only to amend the law in 1994 to allow joint custody only when the parents agree. A survey of the family court judges found that two-thirds concluded that joint custody imposed under a presumption led to mixed or worse results for children due to lack of parental cooperation, continuing parental conflict, instability caused by moving between household and the logistical difficulties for parents.¹ Further, a report from the state of Washington concluded that joint physical custody in high conflict families is detrimental to children and does not foster better communication or cooperation between parents.² A one size fits all approach to custody determinations is inappropriate and may actually be harmful to some families.

Historically, the trend in custody law has been away from judicial presumptions and toward individual assessments. The tender-years doctrine, which presumed that mothers were the best custodians for young children, has all but disappeared from custody laws. With the emphasis on gender equality and increased focus on the parenting roles of fathers, this doctrine has given way to

¹ Thomas J. Reidy, et al., *Child Custody Decisions: A Survey of Judges*, 23 Fam. L. Q. 75, 80 (1989); Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 Fam. L. Q. 201 (1998).

² Diane N. Lye, *Report to the Washington State Gender and Justice Commission and Domestic Relations Commission* (June 1999) at 4-17, 4-18, 4-20. See also, Eleanor E. Maccoby & Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody*, Cambridge, MA: Harvard University Press (1992).

an individual assessment based on the best interests of the child. Inserting a presumption of joint custody confuses the child's best interests with parental interests. Further, deciding custody on the basis of a presumption is not probative of what is in the child's best interests because it simply provides the judge with a conclusion without any proof to the contrary.

A presumption of joint custody places victims of domestic violence at risk.

A presumption of joint custody compromises the safety of battered women by providing the batterer with continuing opportunities for control, abuse and violent contacts leading to further victimization of the victim and children. Children are adversely affected when they witness domestic violence or are present in homes characterized by violence. This finding was recognized by the Michigan legislature when it adopted domestic violence as one of the best interest factors in custody determinations.³ Further, studies have shown that joint custody is especially harmful when one parent is abusive, rigid, manipulative, or angry about being divorced.⁴

Exempting cases of domestic violence from the presumption will not provide adequate protection for these families because many victims will not disclose the abuse for many reasons, including failure to identify abuse, lack of evidence, embarrassment and the potential for retaliatory violence from the batterer that may result from disclosure. Moreover, many victims may be afraid to present evidence of abuse to show the other parent is unfit, fearful that their allegations will be ignored or used against them by batterers and courts who perceive such allegations as simply a strategic maneuver to gain an advantage in the custody dispute.⁵ A presumption of joint custody gives batterers an advantage in a custody dispute and unfairly burdens the victim of domestic violence with rebutting the presumption.

A presumption of joint custody will further impoverish children.

An award of custody does not guarantee that a parent will be involved in the child's day-to-day life or provide financially for the child's needs. Joint custody arrangement is more expensive because it requires parents to maintain two suitable households with sufficient necessities for the children at each home. Under Michigan's shared economic responsibility formula, when children spend equal time with both parents, child support awards will be reduced thereby providing fewer financial resources to the lower income parent who is most in need of additional resources. In some cases, a parent seeks joint custody not to spend more time with a child, but as a subterfuge to avoid financial responsibility of higher child support payments or to bargain a better property settlement.

A presumption of joint custody and the resulting reduction in child support will likely affect low income households more severely. Eligibility rules for benefit programs administered by Michigan's Department of Human Services are based on the fact that a child lives in one household. Benefits are generally not split for a child who resides equally in two households. Similar eligibility rules govern receipt of benefits for disabled children such as Supplemental

³ MCL 722.23(k).

⁴ Janet R. Johnston, *Children's Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision-Making*, 33 Fam. and Conciliation Cts. Rev. 415 (1995).

⁵ Margaret M. Barry, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 Catholic U. L. Rev. 767, 799-801 (1997).

Security Income. A child subject to an order of joint custody may face the loss of necessary benefits and services.

A presumption of joint custody is unnecessary under current Michigan law.

Joint custody, where parents voluntarily consent and commit to such an arrangement is not objectionable and is already provided in Michigan law. In fact, Michigan law goes further in its support for joint custody in any custody disputes and provides: “the parents *shall* be advised of joint custody. At the request of either parent, the court *shall* consider an award of joint custody, and *shall* state on the record the reasons for granting or denying a request. In other cases joint custody may be considered by the court.”⁶ The statute provides for an award of joint custody based on a finding that it’s in the child’s best interests and that the parties are able to cooperate. A finding of cooperation is necessary to protect children from the contentious and sometimes abusive parental relationships that make joint custody harmful to them.

Michigan families and children would be better served by continuing our current practice of considering joint custody in all cases and awarding it where the parents agree, are committed, can communicate and are not in conflict. Based on the risk of harm to children and victims of domestic violence, joint custody should not be imposed through a statutory presumption.

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⁶ MCL 722.26a (emphasis added).

